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No. 87-862

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROBERT VANHERBERT,
Petitioner

-vs-

STATE OF OHIO,
Respondent

On Petition For Writ of Certiorari
To The Supreme Court of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Defendant was indicted for one count of Aggravated Trafficking and two counts of Receiving Stolen Property. Prior to trial the Defendant filed a motion to suppress the evidence that was seized in this case. The trial court partially granted the Defendant's motion to suppress. Stolen property that was seized from the Defendant's house was suppressed by the trial court. The two counts of Receiving Stolen Property were subsequently dismissed by the court and are not a subject of this appeal. The trial court overruled the Defendant's motion to suppress the cocaine which was found in the Defendant's house. The Defendant was subsequently tried on one count of Aggravated Trafficking and was found guilty after a jury trial on this charge.

The trial court sentenced the Defendant to five-to-fifteen years in the Ohio State Penitentiary with a three year period of actual incarceration. The Defendant was also ordered to pay a fine in the amount of $7,500 and to pay the costs of prosecution. The trial court also ordered that the Defendant's sentence be served consecutively with the Defendant's sentence on another case.

On May 13, 1987, the Ninth District Court of Appeals affirmed the Defendant's conviction. On September 23, 1987, the Ohio Supreme Court overruled the Defendant's motion for jurisdiction. The Defendant now seeks the jurisdiction of this Court by filing a petition for a writ of certiorari.

STATEMENT OF THE FACTS

On November 1, 1985, Detective Tom Miksch of the Akron Narcotics Department, filed an affidavit for a search warrant for 994 Delia Avenue which is the home of the Defendant. The affidavit indicated that a confidential informant had seen the Defendant in possession of cocaine within the past three days. Detective Miksch also indicated in the affidavit that the Defendant had two counts of Trafficking pending against him in the Court of Common Pleas and has a past history of selling narcotics. Judge Mack of the Akron Municipal Court issued a search warrant for cocaine, controlled substances, and any evidence of controlled substances.

At approximately 1 p.m. on November 1, 1985, Detective Miksch and other members of the Akron Narcotics Squad went to 994 Delia Avenue to search the Defendant's house. Detective Miksch knocked on the Defendant's door and identified himself as a police officer. After waiting a few seconds, the police forced open the Defendant's door and searched the Defendant's residence. Upon entering the house the police found the Defendant exiting the bathroom. The police searched the Defendant's house and found 19 grams of cocaine hidden in a dresser drawer in the basement. The cocaine was packaged in small plastic bags and was hidden under some clothing. The police also found a small amount of cocaine located in the desk drawer of the Defendant's living room. The police found several scales to weigh the

cocaine, snow seals, plastic baggies to package the cocaine, and other various drugs and drug paraphernalia. The police also seized $7,400 in small bills that was found in the Defendant's bedroom.

After the police found the cocaine, the Defendant was arrested and given his Miranda rights. The Defendant made a statement to the police where he indicated that he knew about the search warrant but had forgotten about the cocaine located in the basement. The Defendant also stated that "you got me good this time" and that he wanted to help the police capture his source of cocaine.

The Defendant's defense at trial was that he was not the owner/occupant of 994 Delia Avenue and that the cocaine belonged to his son.

SUMMARY OF ARGUMENTS

ARGUMENT I

A MOTION TO SUPPRESS WILL NOT BE GRANTED WHERE THE WARRANT IS BASED UPON PROBABLE CAUSE AND THE POLICE DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

ARGUMENT II

WHERE A COURT ARTICULATES ITS FINDINGS ON THE RECORD WHEN DENYING DEFENDANT'S MOTION TO SUPPRESS AND THE DEFENDANT FAILS TO OBJECT TO THE SUFFICIENCY OF THESE FINDINGS, THE DEFENDANT HAS NOT BEEN DENIED DUE PROCESS OF LAW.

ARGUMENT III

A DEFENDANT IS NOT DENIED DUE PROCESS OF LAW WHERE THERE IS SUFFICIENT EVIDENCE TO SUPPORT A VERDICT.

ARGUMENT IV

A PROSECUTOR'S CLOSING ARGUMENT DOES NOT DENY THE DEFENDANT DUE PROCESS OF LAW UNLESS THE DEFENDANT IS DENIED A FAIR TRIAL.

- ARGUMENT I

A MOTION TO SUPPRESS WILL NOT BE GRANTED WHERE THE WARRANT IS BASED UPON PROBABLE CAUSE AND THE POLICE DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

Appellant in his first argument contends that the affidavit for the search warrant failed to establish sufficient probable cause to issue a warrant. It is a well established principle that the application for a search warrant need not make out a prima facie showing of criminal activity in order to establish probable cause to search. The affidavit needs only to convince a reasonably prudent person of the probability that certain enumerated items will be found in the place to be searched. Beck v. Ohio, 379 U.S. 89, 96 (1964). Hearsay may be the basis of the finding of probable cause provided there is a substantial basis for believing the

source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Crim. R. 41(C). Furthermore, the issuing magistrate is allowed broad discretion to make the determination of whether the probability has been established, and once made, courts of review ordinarily afford great deference to that determination. Aguilar v. Texas, 378 U.S. 108, 111 (1964). As stated in U.S. v. Ventresca, 380 U.S. 102, 109 (1965):

> [W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hyper-technical, rather than a common sense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

Moreover, due to this great deference, the magistrate's determination should only be disturbed if it was arbitrarily exercised. U.S. v. Swihart, 554 F.2d 264 (6th Cir. 1977), U.S. v. Sevier, 539 F.2d 599 (6th Cir. 1976).

In Massachusetts v. Upton, 466 U.S. 727, 728 (1984), the United States Supreme Court stated:

> "Last Term, in Illinois v. Gates, 103 S.Ct. 2317 (1983), we held that the Fourth Amendment's requirement of probable cause for the issuance of a warrant is to be applied, not according to a fixed and rigid formula, but rather in the light of the 'totality of the circumstances' made known to the magistrate. We also emphasized that the task of a reviewing court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant.***."

In Illinois v. Gates, 462 U.S. 213, 238-239 (1983) this court stated:

> "***The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed.***."

In the case at bar, Defendant Miksch set forth the following pertinent facts in the affidavit to establish probable cause:

> 1. Within the past 3 days, a confidential informant observed the Defendant at 994 Delia Avenue with white powder believed to be cocaine.
>
> 2. The informant has known the Defendant for 10 years and has seen him possess

> controlled substances on many occasions.
>
> 3. The informant possessed information that was corroborated by Detective Miksch concerning the possession and sale of controlled substances in the Akron area. The informant was familiar with cocaine and its effects on users.
>
> 4. On February 15, 1985, the Defendant had been arrested and charged with selling drugs from 994 Delia Avenue. One of the drugs the Defendant was accused of selling was cocaine.

Based on the above facts contained within the affidavit, the State contends the magistrate had a substantial basis for concluding that probable cause existed. The Defendant contends the motion to suppress should have been granted because the detective lied when writing the affidavit. There is simply no support for Defendant's allegations that Detective Miksch resorted to falsehoods when writing the

affidavit except the Defendant's self-serving testimony. Here, the trial court found Detective Miksch to be a credible witness when it overruled the Defendant's motion to suppress the drugs that were seized in this case. The trial court's determination that the affidavit established probable cause was proper.

In his second contention, the Defendant argues that the police violated his constitutional rights by failing to wait a sufficient time before forcing their way into the Defendant's house.

O.R.C. 2935.12 which governs forcible entries into private homes embodies the constitutional right of citizens against unreasonable search and seizures. This statute provides that before breaking down a door on a

dwelling house, an officer must give notice of his intention to search and then be refused admittance. See, O.R.C. 2935.12. However, police need not strictly follow the knock and announce rule where exigent circumstances justify their conduct. State v. DeFiore, 64 Ohio App.2d 115 (1979). Exigent circumstances which justify forcible entry without statutory compliance include danger to police officers, destruction of evidence, and escape of suspects. State v. Furry, 31 Ohio App.2d 107 (1971). In determining the lawfulness of the entry, this court must look at what the officers had reason to believe at the time of their entry. Ker v. California, 374 U.S. 23, 40 N.12 (1963).

In State v. Roper, 27 Ohio App.3d 212 (1985), the appellate court held that the destruction of controlled substances is an exigent circumstance which could justify an officer's forcible entry into a house only seconds after he has knocked and announced his presence.

In the case at bar, Detective Miksch knocked on the door and announced his identity when serving the search warrant on the Defendant. After waiting a few seconds, the police forced open the door. Detective Miksch testified that a quick entrance was necessary because cocaine can be easily flushed down the toilet. Further, the affidavit in the search warrant also indicated that cocaine can be quickly destroyed. Since the evidence in this case could be easily destroyed, the

police did not violate the Defendant's constitutional rights by forcing their way into the Defendant's house.

In his third contention, the Defendant argues that the police conducted a general search and therefore all of the evidence seized during this search should be suppressed. "A search warrant should not issue to allow a general exploratory search performed with the hope of discovering evidence of a crime. A warrant must be directed towards objects specified in it or for other instrumentalities by which the crime charged had been committed." U.S. v. Osbourne, 630 F.2d 374, 378 (5th Cir. 1980). Here, the search warrant specified what property was to be seized by the police:

> Property to be searched and seized: Controlled

> substance, Cocaine, records and documents as well as measuring and processing devices, will be seized and used as evidence in a prosecution of the person or persons found in control for a violation of Section 2925.11 of the Ohio Revised Code, "Drug Abuse".

The search warrant in this case specifically indicated what evidence was to be seized and did not constitute a general warrant.

The Defendant also contends the police conducted a general search in executing the warrant in this case. First, the Defendant complains that the large amount of cash seized by the police had no nexus to the crime of trafficking in drugs. However, Defendant's possession of large amounts of cash is relevant to prove that the Defendant was trafficking in drugs.

During the search for drugs in the Defendant's house, the police believed

that many items of personal property were stolen property. The police based their suspicions on the fact that the Defendant was already indicted for trading stolen property for drugs and because there were an overabundance of items in the house. The trial court suppressed the stolen property that was taken by the police and held that the plain view doctrine did not apply.

However, the suppression of Defendant's personal property should not affect the validity of the search relating to Defendant's drugs. In State v. Nicholl, 9 Ohio Op.3d 285 (1978), the police entered the Defendant's apartment to investigate a complaint that the Defendant had threatened a neighbor with a gun. The police entered the apartment and saw marijuana in plain view. After the

Defendant was handcuffed and arrested, he consented to a search of his apartment and the police found a gun pursuant to this consensual search. The police later obtained a search warrant and found stolen property and drugs pursuant to this search warrant. The appellate court reversed the lower court, stating that the consensual search was involuntary and suppressed the gun found during the nonconsensual search. However, the court found that the evidence seized in plain view and as a result of the search warrant was validly seized and properly admissible. In this case the police did not invalidate the entire search when they seized stolen property that was not listed in the warrant.

Finally, in Defendant's last two contentions, he argues that the police

did not have a good faith belief that the warrant was valid and that the police lied to obtain this warrant. The trial court ruled that the warrant was valid in this case and therefore the State is not relying on the good faith exception to the warrant requirement. Further, there is nothing in the record to support Defendant's allegations that the police lied in their affidavits or that the police did not believe the warrant was based upon probable cause. Defendant's arguments are based on conjecture and must be rejected by this court.

The Defendant's first argument does not support Defendant's position that a petition for a writ of certiorari should be granted in this case.

- ARGUMENT II

WHERE A COURT ARTICULATES ITS FINDINGS ON THE RECORD WHEN DENYING DEFENDANT'S MOTION TO SUPPRESS AND THE DEFENDANT FAILS TO OBJECT TO THE SUFFICIENCY OF THESE FINDINGS, THE DEFENDANT HAS NOT BEEN DENIED DUE PROCESS OF LAW.

In his second argument, the Defendant contends the trial court denied him due process of law by failing to state its findings on the record when overruling the Defendant's motion to suppress. According to Crim. R. 12(E):

> Ruling on Motion. A motion made before trial other than a motion for change of venue, shall be timely determined before trial. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

In the case at bar, the trial court stated its essential findings on the record when granting the Defendant's motion to suppress the Defendant's

property seized by the police but overruling the Defendant's motion to suppress the drugs seized by the police. Further, although the Defendant now complains that the judge's findings were insufficient, the record fails to indicate that the Defendant objected to the court's ruling or asked for a clarification on the courts ruling at the trial level. It is generally held that a Defendant must object to an error at the trial level in order to preserve the issue for appeal. State v. Lancaster, 25 Ohio St.2d 83 (1971). Here, the Defendant never complained that the trial court's findings of fact were insufficient at the trial level and therefore has waived this issue on appeal. The trial court did not deny the Defendant due process of law.

ARGUMENT III

A DEFENDANT IS NOT DENIED DUE PROCESS OF LAW WHERE THERE IS SUFFICIENT EVIDENCE TO SUPPORT A VERDICT.

The Defendant contends there is insufficient evidence to support the jury's verdict. Where the Defendant contends that the verdict is contrary to law because of insufficient evidence, a court must determine whether there is sufficient evidence to support the verdict rendered. State v. Graven, 54 Ohio St.2d 114 (1975). In State v. Wallen, 21 Ohio App.2d 27, 35 (1969), the court held:

> In determining the sufficiency of the evidence to sustain a conviction, an appellate court is confined to the question of law whether, viewing the evidence in light most favorable to the prosecution, there is substantial evidence, either direct or circumstantial, which, together with

> reasonable inferences to be drawn therefrom, sustains the verdict.

The Defendant contends that the verdict is contrary to law because the State allegedly failed to prove the Defendant possessed cocaine. In State v. Haynes, 25 Ohio St.2d 264 (1971), the court held that mere presence of a controlled substance in a house that is shared with others is insufficient to establish possession without further evidence. However, in the case at bar, the State presented other evidence besides Defendant's occupation of his house to prove Defendant's possession of cocaine. The Defendant's own statements to the police indicate that the cocaine found in Defendant's basement belonged to the Defendant. First, the Defendant told the police he was expecting them but forgot to

dispose of the cocaine found in the basement:

> THE WITNESS: Well, the Defendant told me that he knew that we were getting a search warrant for the place.
>
> He said he was aware of this because he was told the night before by a guy named Joe Dog. He said it was an accident that you guys found this stuff downstairs because I forgot it was there.
>
> I asked him how much was there. I said, "how much was down there, about an ounce?" He said, "no, just a couple of grams." I said, "Robert," I said, "you should have quit before this" and he said, "yeah, you're right."
>
> (T. p. 211)

Later, the Defendant told the police that "you got me good this time" and that he wanted to work out a deal and turn in his source of cocaine. Based on the Defendant's own statement to the police, the State contends there is sufficient evidence to support Defendant's conviction.

Further, the State contends the Defendant's prior acts in selling cocaine from 994 Delia Avenue proves the Defendant's intent to knowingly possess cocaine at this address. See, Evid. Rule 404(B); O.R.C. 2945.59.

Finally, the evidence also indicates that this address was the Defendant's primary residence. The Defendant listed 994 Delia Avenue as his home address and kept his clothes at this residence. Based on the above record in this case, the State contends there is sufficient evidence to prove the Defendant possessed the cocaine found in his house. Therefore, the Defendant was not denied due process of law.

- ARGUMENT IV

A PROSECUTOR'S CLOSING ARGUMENT DOES NOT DENY THE DEFENDANT DUE PROCESS OF LAW UNLESS THE DEFENDANT IS DENIED A FAIR TRIAL.

The Defendant contends the following argument by the prosecutor denied him a fair trial:

> Certainly the Defendant knows it and Detective Miksch and all of the Akron Police officers that you heard about showed up there on November the 1st, 1985 and all they had found was electronic scales and triple beam scales and snow seals and empty plastic bags. Those in and of themselves he would not have been arrested for. Those are not --
>
> MR. WILLIS: Objection.
>
> THE COURT: Sustained. Let's change the subject.
>
> (T. pp. 439-440)

It is generally held that the State is entitled to a wide degree of latitude in its summation of its case.

State v. Smith, 14 Ohio St.3d 13 (1984). Further, "a defendant is entitled to a fair trial, but not a perfect one." Lutwak v. U.S., 344 U.S. 604, 619 (1953).

In the case at bar, the Defendant was not denied a fair trial by the prosecutor's statements. First, the State notes that the trial court sustained the Defendant's objections and prevented the Defendant from suffering any prejudice from the prosecutor's comments. Further, the Defendant has not indicated how he was prejudiced by the prosecutor's statement that the Defendant would not have been arrested if cocaine was not found in his basement. Considering the overwhelming weight of the evidence against the accused, the prosecutor's statement did not deny the Defendant a

fair trial. The Defendant's fourth argument should be rejected and his petition for a writ of certiorari should be denied.

- CONCLUSION

Pursuant to the argument offered, the Respondent respectfully contends that Petitioner's petition for a Writ of Certiorari should be denied, the Petitioner having presented no subtantial constitutional issue, nor has any prejudicial error been demonstrated in the trial court proceedings.

Respectfully submitted,

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APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

OHIO REVISED CODES

2935.12 Forcible entry in making arrest.

When making an arrest or executing a warrant for the arrest of a person charged with an offense, or a search warrant, the officer making the arrest may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his attention to make such arrest or such search , he is refused admittance, but an officer executing a search warrant shall not enter a house or building not described in the warrant.

2945.59 Proof of defendant's motive.

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

RULE 12. Pleadings and Motions Before Trial: Defenses and Objections.

(E) Ruling on motion. A motion made before trial other than a motion for change of venue, shall be timely determined before trial. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

RULE 41. Search and Seizure.

(C) Issuance and contents. A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be search. The finding of probable cause may be based upon hearsay in whole or in part, provided there is substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a

warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

RULE 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other crimes.

(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.